

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

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NO. 24592  
(CRIMINAL NO. 1726-69)

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United States of America,

Appellee

v.

Jerry Pearson,

Appellant

United States Court of Appeals  
for the District of Columbia Circuit

FILED DEC 14 1970

*Nathan J. Paulson*  
CLERK

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BRIEF FOR APPELLANT

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Arthur V. Weinberg  
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(Appointed by this Court)

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 1291, Title 28, of the United States Code and Rules 4(b) of the Federal Rules of Appellate Procedure. This is an appeal from a judgment of conviction entered by the United States District Court for the District of Columbia on a jury verdict. This appeal was filed in timely fashion on August 3, 1970.

STATEMENT OF QUESTIONS PRESENTED

1. Whether in connection with appellant's alleged extrajudicial confession appellant knowingly and intelligently waived his right to assistance of counsel.

2. Whether evidence of appellant's alleged extrajudicial confession admitted by means of the testimony of the arresting officer was substantially corroborated.

3. Whether it was impossible in the face of the record for appellant to have had the requisite intent to carry a deadly or dangerous weapon.

. Note: This case had not previously been before the court.

REFERENCE TO RULINGS

Denial of appellant's Motion for Acquittal at conclusion of government's case in District Court, March 4, 1970 (T. 74).

STATEMENT OF THE CASE

On October 28, 1969, the Grand Jury filed a True Bill<sup>1/</sup> charging defendant with violations of 22 D. C. Code Sections 502 and 3204. Specifically, the charges made were as follows:

First Count: On or about September 8, 1969, within the District of Columbia, Jerry Pearson assaulted Joan McCommons with a dangerous weapon, that is, a pistol.

Second Count: On or about September 8, 1969, within the District of Columbia, Jerry Pearson did carry, open or concealed on or about his person, a dangerous weapon, capable of being so concealed, that is, a pistol, without a license therefor issued as provided by law.

On November 13, 1969, defendant was arraigned; pleaded guilty, and was remanded to custody to be held at D. C. Jail.

On March 4, 1970, jury trial was held in the United States District Court for the District of Columbia before the Honorable William B. Bryant, a United States District Judge. Defendant was found not guilty with respect to the First Count and guilty with respect to the Second Count. This brief will direct its attention, therefore, to matters attendant to review of the judgment entered upon the Second Count.

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<sup>1/</sup> Grand Jury No. 2130-69.

In support of its case the government called only three witnesses - Joan McCommons, Janice Lee, and Thomas F. Moore.

Miss McCommons testified that she saw the defendant pull a gun from his pocket (Tr. 17). <sup>2/</sup> The government, however, never produced the alleged gun (Tr. 73). According to her testimony, the defendant and Miss McCommon's brother, Donald Lee, were outside the front gate (Tr. 19) while Miss McCommons was seated inside the house in the front room with her cousin Janice Lee (Tr. 14,15). The defendant was described as being a friend of Miss McCommon's brother (Tr. 16). The testimony of this witness as set out in the transcript (Tr. 13-24) was largely confused and contradictory. The role of Miss McCommon's brother in this incident is not clear on the record. His involvement may well have been substantial, however, since the witness responded as follows to government questioning:

Q: And you are saying that everything you say is true?

A: Yes, Sir. I got my brother, and he ain't around, and he must be guilty. (Tr. 24)

Although a subpoena was issued, Miss McCommon's brother did not appear at the trial.

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<sup>2/</sup> References, unless otherwise stated, are to the transcript of the record.

Miss Lee's testimony indicated that the defendant whom she could not see very well (Tr. 31) took a gun out of his pocket (Tr. 30). She could not see what his face looked like (Tr. 32) and her identification of the defendant as being in possession of a gun was based primarily upon her hearing a comment which she deemed to be uttered by Miss McCommon's brother - "Jerry, let me see the gun." (Tr. 32).

The probative value of the testimony of Miss McCommons and Miss Lee was questioned by the trial judge at a bench conference:

The Court: The eye witnesses did not testify to anything?

Mr. Ranson (Gov't): Yes, sir.

The Court: Do you think anybody could rely on it?

Mr. Ranson: Yes, sir. (Tr. 52)

With specific reference to substantial portions of Miss Lee's testimony the Court indicated to counsel in that bench conference:

When a witness testified directly contrary on the same subject, I have to instruct the jury to forget it. They say one thing, and then they say another thing. That cancels out all of what they say. (Tr. 52)

Officer Thomas Moore of the Metropolitan Police Department testified that the defendant surrendered to him at police headquarters (Tr. 71). Officer Moore recited an alleged conversation held with the defendant which conversation constituted an oral confession (Tr. 71,72).

The parties then entered into stipulation that no permit had been issued to the defendant to carry the pistol (Tr. 75).

At the close of the government's case, defendant moved for judgment of acquittal, which motion was denied (Tr. 74). The defense presented no witnesses.

Upon verdict of guilty on the Second Count, defendant was sentenced to serve not less than 18 months nor more than seven years.

STATUTE INVOLVED

The statute upon which appellant was convicted is 22 D. C.

Code, Section 3204 which provides as follows:

No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years. (July 8, 1932, 47 Stat. 651, ch. 465, §4; Nov. 4, 1943, 57 Stat. 586, ch. 296; Aug. 4, 1947, 61 Stat. 743, ch. 469; June 29, 1953, 67 Stat. 94, ch. 159, §204(c).)

STATEMENT OF POINTS

1. The trial court committed plain error in admitting evidence of an alleged extrajudicial confession made without assistance of counsel and in violation of appellant's rights under the Sixth Amendment. (With respect to this point appellant respectfully requests the Court to read the following pages of the transcript: 60-73, 87-88).

2. The trial court committed plain error in not instructing the jury to disregard all testimony with respect to the alleged confession for failure of the prosecution to corroborate the testimony given with respect thereto. (With respect to this point appellant respectfully requests the Court to read the following pages of the transcript: 60-74, 87-88).

3. The trial court committed plain error in failing to rule as a matter of law that it was impossible on the basis of the trial record for appellant to have had the intent necessary to sustain the charge of carrying a deadly weapon.

ARGUMENT

I. Evidence with Respect to Appellant's Alleged Confession Was Not Properly Admissible Since Right to Counsel Was Denied

It has been long established that plain errors or defects affecting substantial rights may be noticed on appeal although they were not brought to the attention of the trial court. It has always been the rule that in order to prevent a miscarriage of justice, a Federal appellate court, in the exercise of a sound discretion, may notice plain and vital errors occurring during the trial of a criminal case, although not preserved for review by objection or exception. Wiborg v. United States, 163 U.S. 632, 658, 16 S. Ct. 1127, 1197, 41 L.Ed. 289; Crawford v. United States, 212 U.S. 183, 194, 29 S. Ct. 260, 53 L. Ed. 465; Whitney v. People of State of California, 274 U.S. 357, 380, 47 S. Ct. 641, 71 L. Ed. 1095. It is in this context that the following point is raised.

The trial court permitted Officer Thomas F. Moore of the Metropolitan Police Department to testify to facts allegedly confessed to him by appellant during a period of initial questioning at the offices of the Criminal Investigation Division, Metropolitan Police Department.

This failure to take reasonable steps to assure appellant's understanding of the entire situation is inexcusable since a suspect's need for counsel is at no other time so urgent as during questioning. Escobedo v. Illinois, 378 US 478 (1964). Appellant was not provided an attorney at this point, and admittedly, he made no request for one. The government, however, has the burden of providing counsel whether or not the accused made such a request in the absence of an effective waiver. Camley v. Cochran, 369 US 506 (1962). For effective waiver to exist and individual must knowingly and intelligently waive his constitutional rights, and the burden rests with the state to prove that any waivers were so made. Escobedo v. Illinois, supra. No such showing is evident on the face of this record. In fact, the only reasonable conclusion is to the contrary. The courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not assume acquiescence in the loss of fundamental rights. One who is not represented by counsel, and who has not competently and intelligently waived his constitutional rights may not be convicted, the jurisdiction of the court being considered lost. Johnson v. Zerbst, 304 U.S. 458 (1938).

During voir dire Officer Moore stated as follows with respect to his statement advising appellant of his rights to counsel: <sup>3/</sup>

I believe I stated to him that you want to know your rights before I talk to you. And I brought out a card and I advised him of his constitutional rights and advised him that he was under arrest and that any statement he might make, could be used against him. That he had a right to have an attorney with him if he wanted to make a statement, and he didn't have to make a statement if he didn't want to, and if he made a statement, he could stop making that statement at any time and still request an attorney.

And Mr. Pearson stated to me, he said it isn't necessary, he said it was just an accident. He said, "I haven't anything to hide."

From the foregoing it is obvious that the appellant clearly did not understand the jeopardy in which he was being placed. Appellant's response that counsel was not necessary because ". . . it was just an accident " reflects his reliance upon an inaccurate presumption to the effect that if it were, in fact, an accident, as appellant understood the term, he was not subject to any legal penalty. The witness did not recite any further efforts on his part or by anyone else to assist appellant's understanding of the situation.

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<sup>3/</sup> This was repeated before the jury in essentially the same form during direct testimony (Tr. 71-72).

There exist very precise standards which must be met before a defendant may be said to have knowingly and intelligently waived his right to counsel. These standards were recited in U S ex rel Ackerman v Russell, 388 F 2d 21 (3rd Circuit, 1968), a case in which a defendant's confession was voided since waiver of counsel was held not to be knowingly and intelligently made. <sup>4/</sup> The court states as follows in this regard:

"The governing principle for determining what constitutes a competent and valid waiver of the right to counsel and responsibility of the trial judge in accepting such a waiver in light of a strong presumption against waiver is stated. . . (at 23)

To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges, and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. . . " (at 23)

The record below reflects a total disregard by the arresting officer of the level of understanding of the appellant. The officer was obviously quite content to rely upon appellant's misplaced confidence that recitation of the facts of an accidental occurrence could hold no

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<sup>4/</sup> See also Von Moltke v. Gilles, 332 U.S. 708, 724, 68 S. Ct. 316, 323, 92 L. Ed. 309, (1948).

danger to him. Had counsel been present appellant would have been apprised to the contrary. The law in this jurisdiction does not recognize the accidental nature of the shooting to be an absolute defense from prosecution. Coleman v. United States, D. C. App. 1966, 219 A 2d 496. By not apprising the appellant that he remained in jeopardy the arresting officer actually contributed to appellant's confusion and perpetuated a state of mind not susceptible of making intelligent waiver of the right to counsel.

II. Elements of Carrying and Intent Recited In Confession  
Not Corroborated by Substantial Independent Evidence

In the United States our concept of justice that finds no man guilty until proven has led our state and Federal courts generally to refuse conviction on testimony concerning confessions of the accused not made by him at the trial of his case. Warsower v. United States 312 U.S. 342, 345 at note 2. In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace may tinge or warp the facts of the confession. Admissions retold at trial are much like hearsay, that is statements not made at the pending trial. They had neither the compulsion of oath nor the test of cross-examination. Opper v. United States 348 U.S. 84 (1954). Whether or not such statements of an accused are treated as a confession or as an admission of essential facts or elements of a crime, corroboration is required. Opper v. United States, supra.

In the present case the pistol discussed by Officer Moore was never produced by the government. Further, Donald Lee, the only person who conceivably could have testified first hand as to the act of "carrying"<sup>5/</sup>

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<sup>5/</sup> Webster's New International Dictionary Second Edition Unabridged provides the following as a first definition of the word "carry":  
"to convey or transport while supporting."

and shed light also on appellant's "intent" was never produced. The only really damaging evidence was the uncorroborated recitation of Officer Moore that:

(Tr.72) [W]e went back in the squad room to a desk and we sat down and he related that earlier in the evening, he had a .25 caliber automatic pistol and he was playing with it; that he had removed the clip, feeling sure the weapon was empty. He held the gun up to his eye, I believe his right eye, and he squeezed the trigger, and he related he was extremely surprised, because the weapon had gone off, that he hadn't realized there was round in the chamber, and that it had struck Joan McCommons.

He stated he became scared and fled the scene. He related he had gotten a cab and driven down Independence Avenue, over East Capitol Street Bridge, and en route, just alongside the D. C. General Hospital, prior to coming to the parking lot just at the foot of the bridge, he had thrown the described weapon out of the car into the grassy part area.

Corroboration must consist of substantial evidence independent of the accused's extra-judicial statements which tend to establish the whole of the corpus delecti. Forte v. United States, 68 App. D. C. 111, 94 F. 2d 236, Ercoli v. United States 76 U. S. App. D. C. 360, 131 F. 2d 354. This evidence must be both independent and substantial. Scarbeck v. United States, 217 F. 2d 546 (1962).

The necessary corroborative evidence could only have come from the testimony presented by Joan McCommons and Janice Lee. Absent from this record is any corroborative evidence whatever that appellant physically "carried" a gun, i.e. transported it from one place to another. Also absent from this record is any corroborative evidence as to the intent of appellant to carry any such weapon. <sup>6/</sup> The probative value of the testimony of witnesses McCommon's and Lee is virtually non-existent.

Neither Miss McCommons nor Miss Lee offered testimony as to how the alleged pistol came to be in the front yard. They offered no testimony either with respect to appellant's activities with respect to any pistol after the shooting. The damaging evidence with respect to the carrying charge may well have been Officer Moore's testimony that the appellant "had a .25 caliber automatic pistol"; was "playing" with

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6/ Appellant would like the Court to consider as set forth hereinafter the possibility that one carrying a pistol with the understanding that it was not loaded was incapable of intending to carry a dangerous weapon. This is particularly relevant since the statute in point being penal, prohibitive and in derogation of the common law it must be given a strict rather than a liberal construction. Brown v. United States, D. C. Mun. App. 1949, 66 A 2d 173.

it; became scared and "fled" with it; and threw the pistol out of a cab (Tr. 72). Only the uncorroborated testimony of the officer supported the carrying charge. This is not adequate to sustain the conviction.

Forte v. United States, supra.

III. The Trial Court Committed Plain Error In Not Deciding As A Matter of Law That Appellant Could Not Have the Intent Requisite to A Conviction

The trial judge instructed the jury as follows with respect to the elements of the charge of carrying a deadly weapon:

The second offense charged in the indictment, charges the offense of carrying a dangerous weapon, and this offense also has its essential elements, each of which the government must prove beyond a reasonable doubt. The first of these is that the defendant carried either openly or concealed, on or about his person, a pistol. Secondly, that he so carried the pistol in a place other than his home or place of business or other land possessed by him. Thirdly, that he was not licensed to carry a pistol. And lastly, that he had the intent to do the act that constituted carrying a pistol without a license (Tr. 90-91).

The record as it now stands clearly indicates that appellant believed the gun to be empty (Tr. 15, 16, 63, 66). The gun was being carried as a toy.<sup>7/</sup> In this jurisdiction the test of whether an object being carried by an accused is a dangerous weapon is whether the purpose of carrying the object under the circumstances is its use as a dangerous weapon. Clarke v. United States, 256 A 2d 782, D. C. App. 1969.

<sup>7/</sup> Officer Moore's testimony was to the effect that appellant was "playing" with the gun (Tr. 72).

There is absent here any evidence of intent to use the gun as a dangerous weapon. The record reflects that appellant removed the clip (Tr. 72), an affirmative act evidencing his intention not to have in his possession or carry a dangerous weapon. There is no evidence that the bullet clip was in any proximity to the defendant so as to enable him to have quick access. Had this been shown, surely it would have permitted an adverse inference as to his intention to utilize the mechanism as a weapon. This has not been shown.

The incident happened at the home of Donald Lee, characterized repeatedly on this record as a friend of the appellant's (Tr. 15,16). There is no evidence of a dispute or a crime being perpetrated which would place the gun in a context where it could be inferred that its intended use was as a weapon. Appellant finds no case in this jurisdiction where in such circumstances the defendant was convicted of carrying a dangerous weapon.

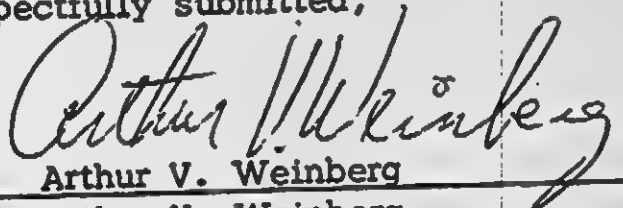
Appellant recognizes that the record as now constituted reflects that the gun discharged and was, in fact, dangerous. The necessary intent, an essential ingredient of the crime, was missing nonetheless. The mechanism which appellant intended to carry was neither dangerous

nor intended for use as a weapon. Appellant was perhaps guilty of negligence in connection with this incident and may thereby be subject to civil suit. However, the intent necessary to a conviction of this crime is missing.

CONCLUSION

Appellant submits that for the reasons specified above, the judgment of conviction should be rendered void and the conviction vacated.

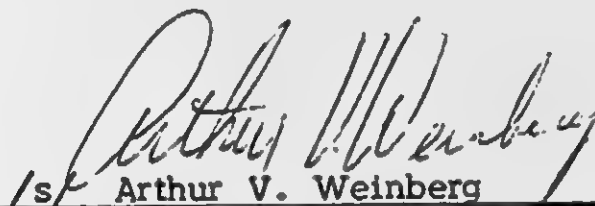
Respectfully submitted,

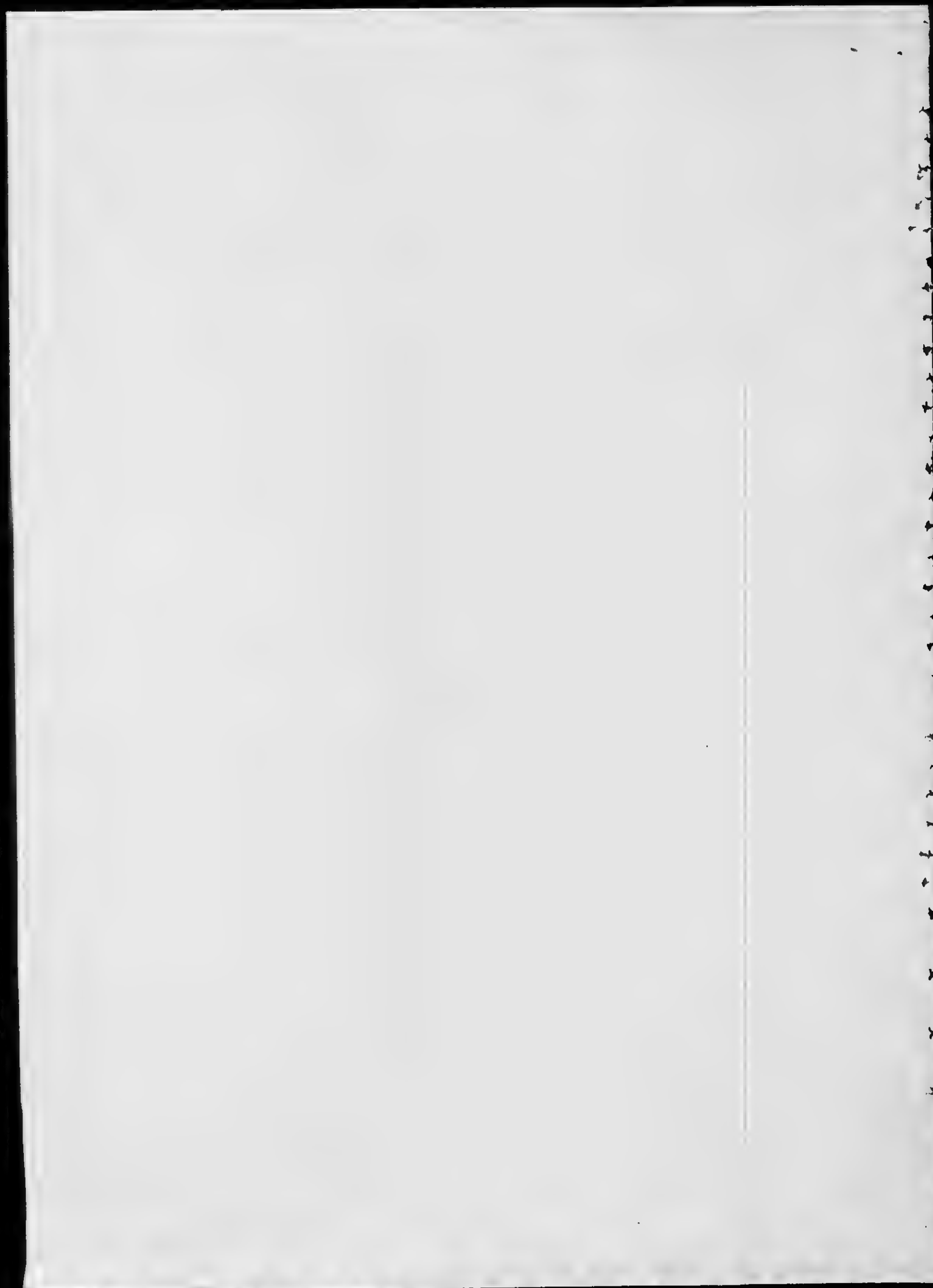
  
/s/ Arthur V. Weinberg  
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief of Appellant  
was served by hand this 14th day of December, 1970, on

The Honorable Thomas A. Flannery  
United States Attorney for the District of Columbia  
Attorney for Appellee

  
/s/ Arthur V. Weinberg  
Arthur V. Weinberg



BRIEF FOR APPELLEE

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United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,592

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UNITED STATES OF AMERICA, APPELLEE

v.

JERRY PEARSON, APPELLANT

---

Appeal from the United States District Court  
for the District of Columbia

---

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Cr. No. 1726-69

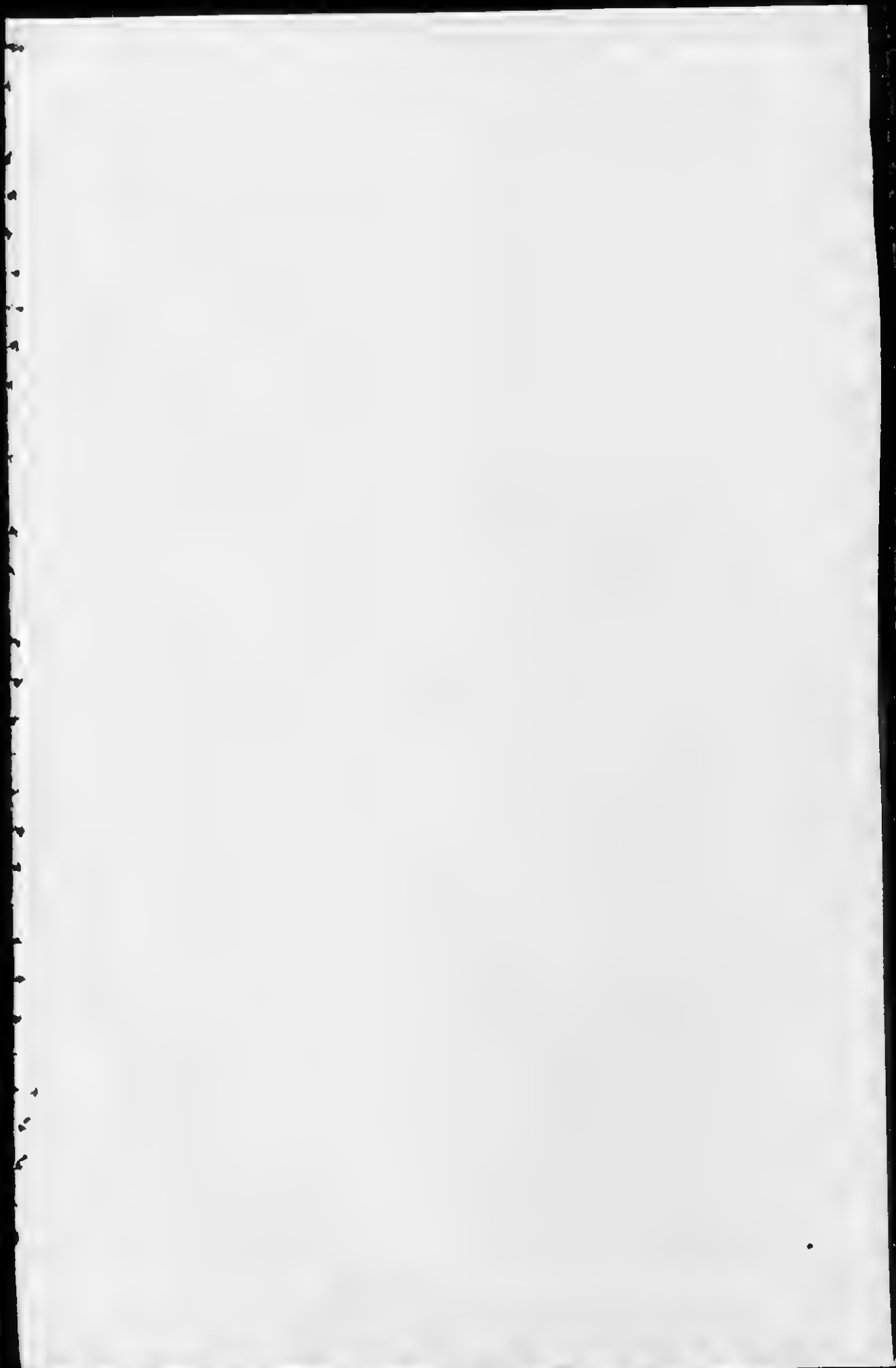
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United States Court of Appeals  
for the District of Columbia Circuit

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FILED FEB 17 1971

*Nathan J. Paulson*  
CLERK



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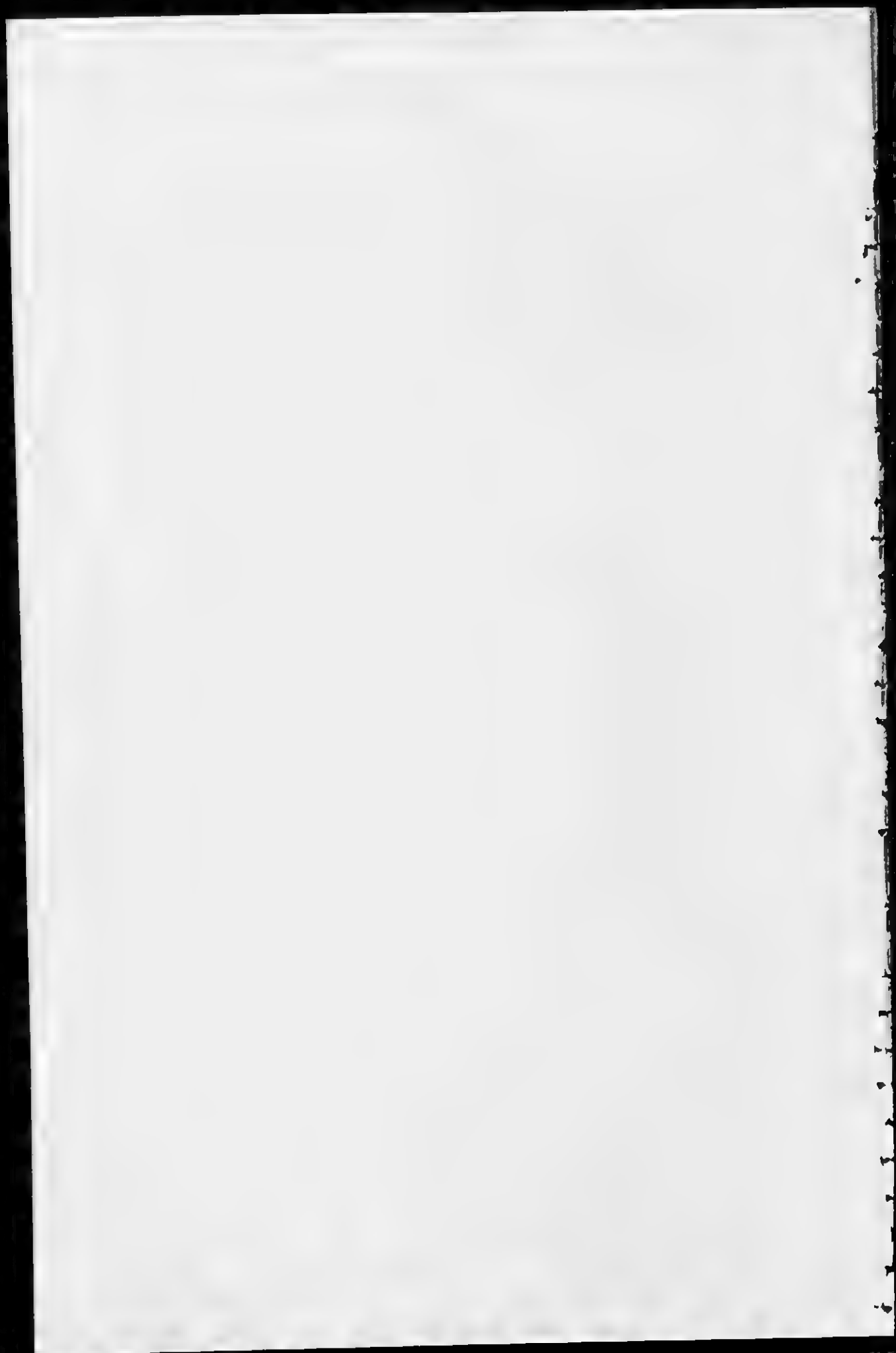
### ISSUE PRESENTED \*

In the opinion of appellee the following issue is presented:

Whether appellant's statement to Detective Moore made immediately after he surrendered to the police and was advised of his rights was properly admitted at trial.

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\* This case has not previously been before this Court.



**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 24,592

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UNITED STATES OF AMERICA, APPELLEE

*v.*

JERRY PEARSON, APPELLANT

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Appeal from the United States District Court  
for the District of Columbia

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BRIEF FOR APPELLEE

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**COUNTERSTATEMENT OF THE CASE**

In a two-count indictment filed October 28, 1969, appellant was charged with assault with a dangerous weapon and carrying a pistol without a license, in violation of 22 D.C. Code §§ 502 and 3204, respectively. On March 4, 1970, he went to trial before Judge William B. Bryant and a jury and was found not guilty of assault with a dangerous weapon and guilty of carrying a pistol without a license. On March 10, 1970, a statement was filed indicating that appellant had previously been convicted of grand larceny. On July 31, 1970, appellant was sentenced to imprisonment for a period of eighteen months to seven years. This appeal followed.

Early on the morning of September 8, 1969, Joan McCommons sat in the front room of her mother's home at 803 I Street, S.E., with her cousin, Janice Lee, while Donald Lee, Miss McCommon's brother, and appellant stood outside the gate to the front yard (Tr. 14-15, 61, 72). Though appellant was Donald Lee's friend, he was not known to Miss McCommons, and she ordered him to leave<sup>1</sup> (Tr. 15-16, 19). At this appellant approached the door of the house and, when told to leave a second time, withdrew a gun from his pocket, pointed it at Miss McCommons and said, "I'm going to shoot you" (Tr. 14-15, 22). As appellant stood just outside the screen door pointing the pistol inside, it discharged, injuring Miss McCommons (Tr. 15-16, 30). Appellant then entered the house, and when told he had shot Miss McCommons, he ran from the scene (Tr. 34, 36). Both Joan McCommons and Janice Lee, who had known appellant as "Jerry" prior to the shooting, identified appellant at trial as the person who had pointed and fired the gun (Tr. 27, 30). Miss McCommons was hospitalized in critical condition for three weeks (Tr. 16).

At about 12:15 on the morning of September 8, Detective Thomas F. Moore of the Metropolitan Police responded to 803 I Street, S.E. Accompanied by Donald Lee, Moore then proceeded to a house on 7th Street, where he advised appellant's family that appellant, absent at the time, had best surrender himself (Tr. 61, 67). At about 2:00 a.m. Moore learned that appellant was waiting for him at his office (Tr. 61).

Responding to the general assignment office of the Criminal Investigation Division at 35 K Street, N.E., Moore found appellant waiting in the foyer of the building, where he had been taken by officers in a patrol car after advising them that he wished to surrender (Tr. 62, 64-65). Appellant identified himself as Jerry Pearson,

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<sup>1</sup> There is no indication in the record as to why appellant was ordered to leave.

whereupon Moore immediately "brought out a card" <sup>2</sup> and advised appellant of his right to remain silent and his right to an attorney (Tr. 62-63, 71-72). Appellant replied that he had nothing to hide and that the shooting was an accident (Tr. 63, 72). He then accompanied Moore to his office and stated that while in front of 803 I Street he removed the ammunition clip from a .25 caliber automatic pistol, pointed the pistol and pulled the trigger, thinking it was unloaded. When the gun discharged and Miss McCommons was wounded, he became frightened and fled, later abandoning the gun near D.C. General Hospital (Tr. 63, 72). Moore's testimony regarding his conversation with appellant was admitted without objection at trial, and it was stipulated that appellant had no license to carry a pistol in the District of Columbia (Tr. 75). Appellant did not testify. The gun was never found (Tr. 72-73).

### ARGUMENT

Appellant's spontaneous volunteered statement was not subject to the requirements of *Miranda*.

(Tr. 62-73)

A statement made during custodial interrogation in the absence of counsel is admissible at trial only if the accused is first adequately informed of, and intelligently waives, his privilege as to incriminating statements and right to counsel. *Miranda v. Arizona*, 384 U.S. 436 (1966). Appellant's first argument, as we understand it, is that he could not have knowingly and intelligently waived his right to counsel while erroneously believing that he was immune to all criminal liability if the shooting was in fact an accident, and that prior to making a statement he should have been warned of the possible extent of his criminal liability and advised that such lia-

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<sup>2</sup> Presumably this refers to the Metropolitan Police Department's Form PD-47, as indicated by Moore's subsequent testimony that he read appellant "the usual format" (Tr. 71).

bility would be incurred notwithstanding that the shooting was accidental (Brief for Appellant, pp. 10-14).

The requirements of *Miranda* are not applicable to "volunteered" statements.<sup>3</sup> Commenting on this aspect of *Miranda*, this Court in *Bosley v. United States*, 138 U.S. App. D.C. 263, 426 F.2d 1257 (1970), noted:

It would indeed be a harsh rule with respect to a volunteered statement made by one who walked into the police station in order to confess, or who volunteered his confession over the telephone, to prohibit its admission in evidence because the volunteered statement was offered before the police could give the required warning. In these situations there would be no opportunity for overreaching or other abusive practices on the part of the police and consequently one of the main purposes of the *Miranda* decision—the deterrence of such practices—would not be involved. Exclusion in such situations would serve no useful purpose and the Court wisely limited its rule. 138 U.S. App. D.C. at 266-267, 426 F.2d at 1260-1261.

In the case at bar, appellant surrendered to the police and immediately volunteered a statement (Tr. 61-63, 71-72). As in *Bosley*, there was no interrogation and no opportunity for abusive police practices. The *Miranda* warning afforded appellant was not essential to the admissibility of his statement.

Even if appellant's statement had not been volunteered, his contention that there was no meaningful waiver of his right to counsel because of the arresting officer's failure to inform him of the possible extent of his criminal liability is without support in the case law.<sup>4</sup> It has been consistently held that the scope of a warning prerequisite to an

<sup>3</sup> *Miranda v. Arizona*, *supra*, 384 U.S. at 478.

<sup>4</sup> *Von Moltke v. Gillies*, 332 U.S. 708 (1948), and *Ackerman v. Russell*, 388 F.2d 21 (3d Cir. 1968), relied on by appellant, concern the waiver of counsel at the time of a guilty plea, a proceeding which is qualitatively distinguishable from a confession. See *Boykin v. Alabama*, 395 U.S. 238 (1969).

effective waiver need not exceed that prescribed in *Miranda*. E.g., *United States v. Dowells*, 415 F.2d 801 (9th Cir. 1969); *United States v. Hall*, 396 F.2d 841 (4th Cir.), *cert. denied*, 393 U.S. 918 (1968).

Appellant did not object to the admission of his statement at trial, nor did he allege any misunderstanding or confusion as to his right to counsel. In cross-examining Detective Moore, defense counsel himself elicited substantial testimony as to the content of appellant's statement, the exculpatory aspect of which probably accounts for appellant's acquittal on the assault charge (Tr. 73). Moreover, the record shows appellant's statements to have been incidental to his voluntary surrender and made immediately upon being advised of his rights, thus supporting the finding of an intelligent waiver. *Mitchell v. United States*, — U.S. App. D.C. —, 434 F.2d 483 (1970); *United States v. McNeil*, — U.S. App. D.C. —, 433 F.2d 1109 (1969); *Pettyjohn v. United States*, 136 U.S. App. D.C. 69, 419 F.2d 651 (1969), *cert. denied*, 397 U.S. 1058 (1970). As in *Pettyjohn*, appellant's claim is not that at the time he confessed "he did not understand what he was doing but that what he did was, in retrospect, an unwise thing for him to do." 136 U.S. App. D.C. at 73, 419 F.2d at 655.

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<sup>5</sup> Appellant also makes the frivolous contention that evidence of his guilt was insufficient in that it failed to establish that he conveyed or transported a gun or that he knew the gun was loaded. The fact that appellant withdrew a pistol from his pocket and shot the complainant was established by two eyewitnesses (Tr. 17, 30). Such conduct constitutes "carrying" as proscribed by 22 D.C. Code § 3204. *Brown v. United States*, 58 App. D.C. 311, 30 F.2d 474 (1929); *Waterstaat v. United States*, 252 A.2d 507 (D.C. Ct. App. 1969). The Government was not required to prove that appellant knew that the gun was loaded or, indeed, that the gun was in fact loaded. See *Bolt v. United States*, 55 App. D.C. 120, 2 F.2d 922 (1925); cf. *United States v. Daniels*, D.C. Cir. No. 22,913, decided October 15, 1970; *United States v. Curtis*, 138 U.S. App. D.C. 360, 427 F.2d 630 (1970) (*en banc*).

## CONCLUSION

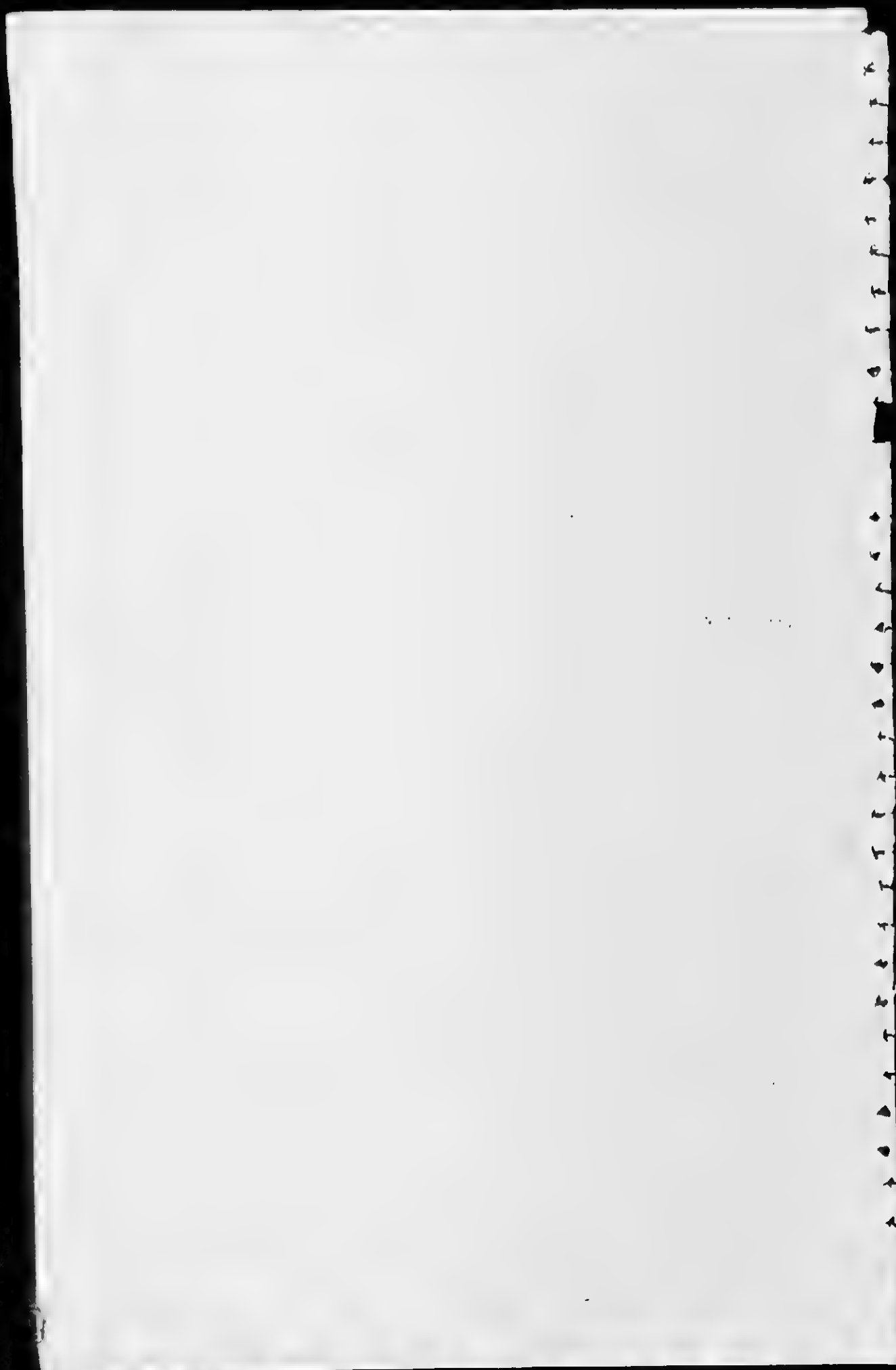
WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.\*

THOMAS A. FLANNERY,  
*United States Attorney.*

JOHN A. TERRY,  
JOHN S. RANSOM,  
ROBERT S. TIGNOR,  
*Assistant United States Attorneys.*

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\* Appellant advances no challenge to the sentencing procedure. See *United States v. Clemons*, D.C. Cir. No. 22,344, decided November 20, 1970 (*en banc*); *United States v. Marshall*, D.C. Cir. No. 22,485, decided June 30, 1970 (*en banc*), *cert. denied*, 400 U.S. — (1970).



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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

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NO. 24592  
(CRIMINAL NO. 1726-69)

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United States of America,

Appellee

v.

Jerry Pearson,

Appellant

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REPLY BRIEF FOR APPELLANT

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United States Court of Appeals  
for the District of Columbia Circuit

FILED MAR 12 1971

*Nathan J. Paulson*  
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## ARGUMENT

### Appellant's Confession Not Exempt From Purview of Miranda

The Government argues that appellant's confession was a volunteered statement with regard to which Miranda is not applicable. This broad-brush approach to confine the vital Miranda protections is unsupportable. This Court has specifically recognized that Miranda applies to all statements which come within its purview, whether volunteered or not. Bosley v United States, 426 F. 2d 1257, 1260 (1970). The question then presented for determination is whether appellant's case, in fact, comes within the purview of Miranda. We believe that this situation clearly invokes the protection accorded by Miranda.

Appellant voluntarily came to the police station for the purpose, as described in Detective Moore's testimony, of surrendering himself. Upon encountering appellant in the front waiting room of the office of criminal investigation, Detective Moore advised appellant of his rights. Whereupon Detective Moore took appellant to the squad room where questioning commenced. (Tr. 62-65). Appellant's statement was made during a period of custodial interrogation from which his confession resulted. This is wholly different from the situation in Bosley, supra, in which the defendant blurted out a statement prior to his arrest or any custodial interrogation whatever.

There is present in the instant case the essential elements which concerned the Supreme Court in Miranda: (a) a police dominated atmosphere, (b) custodial interrogation, and (c) a resultant self-incriminating statement. It was in this precise context that the Court feared abusive practices might occur. Whether or not abusive practices did occur in this instance is of no moment. Rather, our courts must adhere to a policy of liberal protection of Constitutional rights in every instance so as not to encourage abuses in any instance.

Appellant has asserted that he did not knowingly or intelligently waive his right to counsel. Instead, appellant's statement was taken during custodial interrogation notwithstanding the fact that appellant exhibited clearly a failure to understand his jeopardy. Appellant is not seeking to expand Miranda to the point where it is an unduly heavy burden upon law enforcement officers. However, Miranda can retain no meaning if law enforcement officers are not required to acknowledge and react reasonably in situations where persons in custody obviously do not knowingly and intelligently waive their Constitutional rights. Ackerman v Russell, 388, F. 2d 21 (3rd Circuit, 1968).

The Government asserts that the requirements for assuring a knowing and intelligent waiver by appellant are qualitatively less compelling here than in Ackerman, supra, or Von Moltke v Gillies, 332 U.S. 708 (1948), since the instant case involves a confession whereas Ackerman and Von Moltke involve pleas. In support the Government cites Boykin v Alabama, 395 U.S. 238 (1969). This reliance is misplaced. The Government in each instance must demonstrate a knowing and intelligent waiver; Constitutional safeguards may not easily be surrendered. Admissibility of a confession must be based on a reliable determination on the voluntariness issue which satisfies the Constitutional rights of the defendant. The record must show, or there must be an allegation and evidence which show that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver. Boykin, supra at 242. The Court was there speaking of a confession. The Court went on in Boykin to say that "... the same standard must be applied to determining whether a guilty plea is voluntarily made. Boykin at 242 (emphasis added). Certainly, Boykin cannot be construed as lessening the protections where confessions are concerned.

In light of Boykin the standards set out for a knowing and intelligent waiver in Ackerman and Von Moltke are even more compelling and appropriate with respect to your appellant.

Appellant is not proffering the questions decided in United States v Dowells, 415 F. 2d 801 (9th Circuit, 1969) or United States v Hall, 396 F. 2d 841 (4th Circuit, 1968). Appellant does not suggest that law enforcement officers be required to persuade persons in custody to seek advice of counsel. Rather, we seek only a meaningful implementation of the Miranda warnings. Your appellant stated to Detective Moore that an attorney was not necessary because the occurrence was just an accident. This reflects considerably less than the intelligence and understanding necessary to a valid waiver.

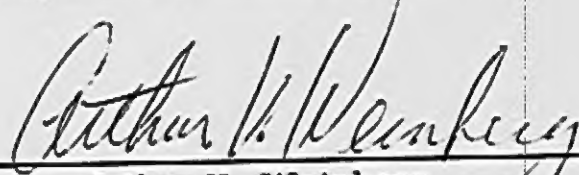
The Government asserts that appellant's waiver was valid and cites certain cases, Mitchell v United States, \_\_\_ U.S. App. D. C. \_\_\_, 434 F. 2d 483, United States v McNeil, \_\_\_ U. S. App. D. C. \_\_\_, 433 F. 2d 659 (1969) as instances where valid waivers were given. On their facts the cases are wholly inapposite here. In fact, appellant finds support for his position in this Court's statement in Mitchell at P. 487 that "... when the only evidence is that at the start of interrogation the warnings were given, and at the conclusion of the interrogation a confession had been obtained, courts would do well to require clear evidence of the vital connecting link, i.e., did the interrogated person in fact waive his rights..." The confession admitted into evidence in appellant's case

was not as immediate to his being advised of his rights as was his statement expressing his reliance upon the accidental nature of the occurrence as an absolute defense -- a wholly misplaced, unintelligent, and unknowing reliance.

CONCLUSION

Appellant submits that for the reasons specified above, the judgment of conviction should be rendered void and the conviction vacated.

Respectfully submitted,

A handwritten signature in cursive script, reading "Arthur V. Weinberg", written over a horizontal line.

Arthur V. Weinberg  
1776 K Street, N.W.  
Suite 700  
Washington, D.C. 20006  
(Appointed by this Court)

March 12, 1971

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing "Reply Brief for Appellant" has been hand delivered to Mr. Thomas A. Flannery, Office of the United States Attorney, Court House, Third and Constitution Avenues Washington, D.C., on the 12th day of March, 1971.

/s/

  
Arthur V. Weinberg

Arthur V. Weinberg

Attorney for the Appellant

(Appointed by this Court)

